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COURT OF CRIMINAL APPEALS
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No. PD-0790-17

In the Court of Criminal Appeals of Texas
At Austin

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COURT OF CRIMINAL APPEALS
2/16/2018
DEANA WILLIAMSON, CLERK

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No. 14-16-00230-CR
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

No. 1454620
In the 230th District Court
Of Harris County, Texas

———♦———

Keithrick Thomas
Appellant

v.

The State of Texas
Appellee

———♦———

State's Brief on the Merits

———♦———

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Trial Judge:

Brad Hart, Presiding judge

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Statement of the Case

The appellant was indicted for possession of between one and four grams of cocaine. (CR 11). Pursuant to a plea bargain with the State, the appellant pleaded guilty. (RR 9-11; CR 58). In accord with that plea bargain, the trial court sentenced the appellant to two years' confinement. (CR 58).[1] The trial court certified that this was a plea bargain case, but matters were raised by written motion filed and ruled on before trial, and the appellant has the right to appeal those matters. (CR 55). The appellant filed a timely notice of appeal. (CR 60).

On direct appeal, a unanimous panel of the Fourteenth Court affirmed the appellant's conviction and sentence in an unpublished opinion. *Thomas v. State*, 14-16-00230-CR, 2017 WL 2484366 (Tex. App.—Houston [14th Dist.] June 8, 2017, pet. granted) (mem. op. not designated for publication).

[1] The judgment and the plea paperwork both state that there was no agreed recommendation as to punishment in this case. (CR 46, 58). However, the discussion of the parties shows the parties agreed to a two-year sentence. (RR 9-11).

Issue Presented in the Appellant's PDR

"Has a Fourth Amendment violation occurred, where a police officer approaches a vehicle passenger, after the passenger has exited the vehicle, and conducts a warrantless search of the passenger's pockets, in the driveway of the passenger's house?"

Summary of the Argument

As with most Fourth Amendment issues, the answer to the appellant's issue depends on the totality of the circumstances. In this case, the deciding circumstances are omitted in the appellant's phrasing of the issue. The Fourteenth Court held that when the passenger exits a vehicle *after* police have initiated a lawful traffic stop, and the warrantless searches of the passenger's pockets are conducted pursuant to well-established exceptions to the warrant requirement, the answer to the appellant's issue presented is: "No." The State believes that holding is correct.

Statement of Facts

Police officers observed the appellant exit the passenger side of a vehicle, enter a known drug house, stay for a short period of time, and then get back into the car. (RR 13). The car drove off, so the

surveilling officers called for uniformed officers in a marked car to observe it. (RR 15). The car made a right turn without signaling, and then came to a stop. (RR 26). Uniformed officers following the car activated their emergency lights and pulled behind the car to initiate a traffic stop. (RR 26).

After the officers initiated the stop, the appellant exited the car and, with a beer can in his hand, began walking toward a house.[2] (RR 26-27). Officer Elizabeth Gemmill told the appellant to stop; he did, but in doing so he made furtive movements toward his waistband. (RR 27). Gemmill went to handcuff the appellant as a matter of safety. (RR 28). She noticed a prescription pill bottle sticking out of the appellant's pocket. (RR 28). Gemmill removed the bottle and observed that it had no name indicating to whom it had been prescribed. (RR 28). She opened the bottle and saw that it contained pills she recognized as Xanax. (RR 28). Suspecting that the appellant might have other controlled substances on him, Gemmill patted him down and discovered in a different pocket a prescription pill bottle that contained cocaine. (RR 29).

[2] It turned out that this was the appellant's home, but Gemmill was unaware of that at the time. (RR 46).

Argument

The Fourteenth Court's opinion is correct. The appellant was detained as part of a traffic stop. When he attempted to walk away from detention, police lawfully stopped him. The officer saw a pill bottle in plain view sticking out of his pocket. After finding Xanax in that pill bottle, the search of the appellant's other pocket (where the cocaine was found) was a lawful search incident to arrest.

In the trial court, the appellant sought to suppress the cocaine found in his pocket. The trial court denied this motion, and the Fourteenth Court affirmed that decision in an unpublished opinion. In a single ground for review the appellant claims that the Fourteenth Court's decision was erroneous.

The State will review the trial court proceedings and the Fourteenth Court's opinion. The State believes that opinion was correct, and that it does not need much additional support from the State. The State will instead discuss the assertions raised in the appellant's brief and show that they do not meaningfully challenge the Fourteenth Court's opinion.

I. Background

A. In the trial court

Prior to trial, the appellant filed a motion to suppress, alleging that the evidence found in his pockets was obtained as a result of an illegal search. (CR 34-36). The trial court held a hearing on this motion prior to trial, with the understanding that if the appellant prevailed on the motion the State would dismiss the charges, but if the State prevailed the appellant would plead guilty and receive an agreed sentence. (RR 10).

At the hearing, the State presented testimony from two police officers — one who observed the appellant enter and quickly leave the known drug house, and one who eventually detained the appellant and found the drugs in his pockets. The appellant presented three witnesses whose testimony contradicted the timeline of the officers' testimony. The appellant himself also testified, contradicting the officers' timeline and the facts of his detention. (*See* RR 71-85).

The trial court found that, under the totality of the circumstances: 1) Officer Gemmill was reasonable in handcuffing the appellant after he made furtive movements; 2) When she did that, the first pill bottle was in plain view; 3) Because the first pill bottle

contained Xanax and did not have a label showing it was prescribed to the appellant, Gemmill then had probable cause to continue searching the appellant, at which point she found the cocaine. (RR 111). The trial court later entered written findings of fact and conclusions of law in which it found that the officers were credible and testified truthfully, and that Gemill's searches were based on probable cause. (Supp. CR 5-7).

B. In the Fourteenth Court

On appeal, the appellant claimed that the trial court abused its discretion in denying his motion to suppress. The appellant made four specific arguments:

> (1) appellant's initial detention was unlawful; (2) appellant's detention "was not temporary and was overly intrusive;" (3) Officer Gemmill unlawfully seized the first pill bottle containing Xanax from appellant's pocket; and (4) Officer Gemmill unlawfully searched appellant's person and seized from another pocket a second pill bottle containing cocaine.

Thomas, 2014 WL 2484366 at *3.

In his first argument, the appellant claimed the traffic stop was unlawful because it was a pretext stop: "From the inception, Officer Gemmill's sole, deliberate purpose was to search [the appellant] and seize any contraband [he] may have possessed." *Ibid.* (quoting the

appellant's brief). The Fourteenth Court rejected this because "[a]n objectively valid traffic stop is not unlawful just because the detaining officer has some ulterior motive for making the stop. *Id.* at *4. (citing *Kelly v. State*, 331 S.W.3d 541, 549 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd)). Because the driver violated a traffic regulation and the appellant was a passenger in the vehicle, Gemmill was justified in detaining the appellant. *Ibid.* (citing *Josey v. State*, 981 S.W.2d 831, 838 (Tex. App.—Houston [14th Dist] 1998, pet. ref'd) and *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)).

The court moved to the appellant's complaints that his detention was "overly intrusive" and "not temporary." The "overly intrusive" complaint had two parts: that Gemmill invaded the curtilage of his house by detaining him in his driveway, and that Gemmill used excessive force by handcuffing him. The court briefly rejected the first complaint by pointing out that Gemmill had detained the appellant as part of the traffic stop, thus she was allowed to stop him from leaving when he walked away from the vehicle, even if it was in his own driveway. *Ibid.* (citing *Davis v. State*, 905 S.W.2d 655, 661-62 (Tex. App.—Texarkana 1995, pet. ref'd)).

Regarding the second part of the appellant's "overly intrusive" complaint, the court pointed out that it was based on an inaccurate version of events. *Id.* at *5. The appellant argued that Gemmill was not justified in handcuffing him because she testified she was not afraid of him. The Fourteenth Court pointed out that Gemmill did not testify she was not afraid for her safety after the appellant made furtive movements near his waistband, and that, given the circumstances, handcuffing the appellant was a reasonable amount of force under the circumstances. *Ibid.* (citing *Chambers v. State*, 397 S.W.3d 777, 781-82 (Tex. App.—Houston [14th Dist. 2013, pet. ref'd) and *Hill v. State*, 303 S.W.3d 863, 872 (Tex. App.—Fort Worth 2009, pet. ref'd)).

The appellant's complaint that the detention was "not temporary" seems to have been that his detention was somehow unlawful because "[o]nce the traffic matter was disposed of, the detention should have ended at that point." *Id.* at *6 (quoting the appellant's brief). The Fourteenth Court rejected this complaint because "the evidence shows that the investigatory stop had just begun when Officer Gemmill stopped and handcuffed appellant. Thus, the traffic stop was in progress and had not concluded." *Ibid.*

The appellant's third argument was that the seizure of the first pill bottle was not authorized under the plain view doctrine. Under that doctrine, an officer may seize evidence if the officer (1) is lawfully in a location (2) can see an object whose incriminating character is immediately apparent and (3) has the right to access the object. *Id.* at *7 (citing *State v. Betts*, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013)).

The appellant challenged only the second part of the analysis, arguing that the pill bottle was not obviously incriminating. The Fourteenth Court disagreed, noting that from the totality of the circumstances known to Gemmill at the time — namely, that the appellant had just visited a known drug house in a manner indicative of a drug purchase, and that individuals often kept illegal drugs in unmarked prescription bottles — Gemmill was justified in seizing the bottle under the plain view doctrine. *Id.* at *7-*8 (citing *McGaa v. State*, No. 04-14-00052-CR, 2017 WL 5176652, at *1, 3-4 (Tex. App.—San Antonio Octo. 15, 2014, pet. ref'd) (mem. op, not designated for publication), *Barron v. State*, No. 08-99-00493-CR, 2001 WL 564266, at *4 (Tex. App.—El Paso May 25, 2001, no pet.) (not designated for publication), and *Lopez v. State*, 223 S.W.3d 408, 411, 417 (Tex. App.—Amarillo 2006, no pet)).

The appellant's final argument was that the search of his second pocket — where the cocaine was found — was unreasonable. The Fourteenth Court responded that once Gemmill had discovered the Xanax in the pill bottle, she had probable cause to arrest the appellant thus the search of the second pocket was a lawful search incident to arrest. *Id.* at *8-*9 (citing , *inter alia*, *Glenn v. State*, 475 S.W.3d 530, 540 (Tex. App.—Texarkana 2015, no pet.) and *Meiburg v. State*, 473 S.W.3d 917, 922 (Tex. App.—Houston [1st Dist.] 2015, no pet.)). The Fourteenth Court noted that it was "irrelevant whether the arrest occurs immediately before or after the search, as long as sufficient probable cause exists for the officer to arrest before the search [is conducted]." *Id.* at *8 (citing, *inter alia*, *Ballard v. State*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999)).

II. The Appellant's Arguments to this Court

The first section of the appellant's argument is titled with a truism: "Fourth Amendment protections extend to investigative detentions." (Appellant's Brief at 9). In this section, the appellant attacks the Fourteenth Court's conclusion that seizing the second pill bottle was legal. (*Id.* at 12). The appellant claims this holding is "clearly erroneous" because neither of the officers testified "that there

was probable cause to search or arrest [the appellant] prior to Officer Gemmill discovering the pill bottles in [the appellant's] pockets." (*Ibid.*).

The appellant then has several pages under the section heading, "Presence in a high crime area is not sufficient to support an investigative detention." (*Id.* at 13-16). Here the appellant discusses this Court's recent opinion in *Marcopoulos v. State*, ___ S.W.3d ___, PD-0931-16, 2017 WL 6505870 (Tex. Crim. App. Dec. 20, 2017), which seems to support the proposition stated in the section heading.

The appellant has a ten-page section of his brief titled, "The driveway of a residence is curtilage and is protected by the Fourth Amendment." (*Id.* at 16-26). The appellant begins this section by noting that there was conflicting testimony regarding whether he was still inside the car when officers initiated a stop, or whether he was already in his driveway when police arrived. (*Id.* at 17-18). The appellant quotes the trial court noting that this was "the main [controversy]" in the case.[3] (*Id.* at 19 (quoting RR 110)). The appellant discusses the nature of curtilage. (*Id.* at 19-26).

[3] The trial court noted that the facts of the case could have been perceived differently by the appellant and Gemmill. (RR 110-11). The trial court's findings of fact reflect that it believed Gemmill's testimony was truthful. (Supp. CR 5).

The next section of the appellant's brief is titled "Furtive gestures, without a reasonably articulable suspicion of criminal activity, do not give rise to probable cause." (*Id.* at 26). After ten pages of discussion regarding *Terry* stops, the appellant recounts the facts of this case, but without mention of the traffic stop. (*Id.* at 35-36).

The penultimate section of the appellant's brief is titled: "The seizure of an object in plain view is not justified if the incriminating nature of the object is not immediately apparent." (*Id.* at 36). This section directly attacks the Fourteenth Court's holding that the seizure of the first pill bottle was justified under the plain-view doctrine. (*Id.* at 36-37). Specifically, the appellant points out that the Fourteenth Court held that it was not "immediately apparent" that the bottle contained Xanax pills not prescribed to the appellant, but held only that Gemmill had "probable cause to associate the pill bottle with contraband and criminal activity." *Thomas*, 2017 WL 2484366 at *8.

After making some factual distinctions between this case and the cases cited by the Fourteenth Court, the appellant goes on to claim

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Though the trial court's findings do not explicitly state that the officers initiated the stop before the appellant got out of the car, the trial court's findings appear to be in chronological order, and when read that way imply that the appellant was still inside the car when officers pulled up behind it. (Supp. CR 6).

that Gemmill's behavior failed two of the three requirements of the plain-view doctrine: Gemmill was unlawfully in the appellant's driveway (thus she was not legally able to see the bottle), and the incriminating nature of the bottle was not immediately apparent. (Appellant's Brief at 40-41).

The appellant's brief ends with a three-and-a-half-page conclusion. (*Id.* at 41-44). For the first time the appellant addresses the traffic stop, arguing that Gemmill's search of appellant was "not at all reasonably related in scope" to the driver's failure to signal. (*Id.* at 41-42). The appellant claims that Gemmill used the traffic stop "as an opportunity to conduct a fishing expedition for the suspected criminal activity of [the appellant]." (*Id.* at 42). The appellant claims that the stop of the vehicle was "not, at all, random." (*Id.* at 43). The appellant points out that both officers who testified said warrants had been served on the drug house before, which indicates that the officers "were fully aware of the warrant requirement." (*Ibid.*).

The appellant claims nothing occurred that justified the extended detention. (*Ibid.*) The appellant claims that he "had every right to retreat into [his] own home and be free from the unreasonable intrusion of the Houston Police Department," and that "the driveway

… is intimately linked to the home itself." (*Id.* at 43-44). The appellant ends his conclusion: "The lower court clearly erred in making the determination that the incriminating nature of the first pill bottle was not reasonably apparent, but that Officer Gemmill still had probable cause to remove the first bottle and, consequently, the second bottle. The factual determination does not jibe with the legal conclusion." (*Id.* at 44).

III. Response to the Appellant's Brief

A. The appellant does not address much of the Fourteenth Court's opinion.

The most notable thing about the appellant's brief is how little it engages the Fourteenth Court's opinion. The linchpin of the Fourteenth Court's opinion is that the traffic stop provided the legal justification for the appellant's original detention. The appellant does not address this holding.[4] Instead, the appellant premises his arguments on a belief that Gemmill handcuffed him while he was simply minding his own business in his own driveway. This is why the

[4] In his petition for review, the appellant addressed the legal significance of the stop in a single paragraph, claiming that "[i]t is questionable whether" the cases cited by the Fourteenth Court were applicable because in those cases the passenger was detained while still inside his vehicle, but in this case the appellant managed to exit the vehicle after the traffic stop before police could physically detain him. (Appellant's Petition for Discretionary Review at 3).

appellant spends so much of his brief attacking alternative bases for detention that made no appearance in the Fourteenth Court's opinion.

The appellant attacks the Fourteenth Court's two holdings regarding the seizures of the pill bottles, but one of his arguments is without substance. Near the beginning of his brief he claims that the Fourteenth Court was wrong to hold that the seizure of the second pill bottle was legal, but the extent of his argument is to label the Fourteenth Court's holding — that the search of the appellant's second pocket was a lawful search incident to arrest — "clearly erroneous." (*See* Appellant's Brief at 12). The appellant notes that police did not have probable cause to arrest him *before* discovering the first pill bottle (*see id.* at 12-13), but this seems more like an observation than a legal argument. The appellant cites no authority for the proposition that a search incident to arrest is valid only if the police form probable cause to arrest the suspect prior to encountering him, and such a holding would be most peculiar.

B. The appellant's arguments regarding Gemmill's plain-view seizure of the first pill bottle are based on a misunderstanding of case law.

The only holding from the Fourteenth Court that the appellant attacks with any substance is the holding that Gemmill was justified in

seizing the first pill bottle under the plain-view doctrine. The appellant claims that the Fourteenth Court found that the incriminating nature of the pill bottle was not "immediately apparent" to Gemmill, but yet it upheld the search. (*See* Appellant's Brief at 36-44). The appellant's complaint is based on an apparent misunderstanding of the Fourteenth Court's holding, and of the plain-view doctrine.

Court descriptions of the plain view doctrine often emphasize that the incriminating nature of the object must be "immediately apparent" to justify a plain-view seizure. The appellant seems to take this as a requirement that officers must know, immediately upon sight, that an object is seizeable (either as contraband or evidence). That is not what "immediately apparent" means, though.

An object's incriminating nature is "immediately apparent" if an officer is able to identify the object as seizable without conducting an additional search. For instance, in *Arizona v. Hicks*, 480 U.S. 321 (1987), police were lawfully in a home on another matter when they observed a sound system that looked suspiciously expensive for the house. *Hicks*, 480 U.S. at 323. In order to determine that the speakers were stolen, though, police had to move the items to read their serial

numbers. Because police had to conduct another search — even if it was only moving some speakers — the information police obtained was not "immediately apparent" and this was not a proper plain-view seizure *Id.* at 324-25.

Hicks contrasts with *State v. Dobbs*, 323 S.W.3d 184 (Tex. Crim. App. 2010). In *Dobbs*, police were serving a search warrant for narcotics when they noticed two sets of golf clubs and some shirts from a local country club laying out in the open. *Dobbs*, 323 S.W.3d at 185. Without manipulating the clubs or shirts, police called dispatch, which confirmed that there had been reports of stolen clubs and shirts from the country club. Police then called the country club, which gave a description of the stolen merchandise that matched what police had found in Dobbs's house. This Court held that this was a lawful plain-view seizure because all the information the police had obtained was immediately apparent: "'immediately apparent' in this context means without the necessity of any further search." *Id.* at 189.

The appellant's complaint regards the degree of certainty that Gemmill had regarding the contents of the first pill bottle. This Court has emphasized that an officer need not be *certain* of an object's incriminating nature before he may engage in a plain-view seizure. *See*

Joseph v. State, 807 S.W.2d 303, 308 (Tex. Crim. App. 1991) ("The immediately apparent prong of the plain view analysis does not require actual knowledge of incriminating evidence."). All that is required is that police have probable cause to believe the object is contraband or evidence. *See Hill v. State*, 303 S.W.3d 863, 874 (Tex. App.—Fort Worth 2009, pet. ref'd) (where officer saw clear plastic baggie containing off-white rocks in plain view in car, and officer's training and experience led him to believe rocks were cocaine, plain-view seizure was justified); *Arrick v. State*, 107 S.W.3d 710, 719 (Tex. App.—Austin 2003, pet. ref'd) (where police were lawfully in house and saw footwear they believed killer wore on night of murder, plain-view seizure was justified even though blood on boots was not obvious until laboratory tests were run).

In this case, Gemmill testified that as she was detaining the appellant she saw a pill bottle sticking out of his pocket. Gemmill had been informed by other officers that the appellant had made a brief visit to a known drug house minutes before the encounter. (RR 48). Based on her training and experience, Gemmill believed that individuals "oftentimes" carry contraband in unmarked pill bottles. The trial court found Gemmill had probable cause after she saw the

pill bottle, as did the Fourteenth Court. (Supp. CR. 7); *Thomas*, 2017 WL 2584366 at *8 ("Although it was not immediately apparent that the pill bottle contained Xanax pills that were not prescribed to appellant, Officer Gemmill did have probable cause to associate the pill bottle with contraband and criminal activity."). Because a plain-view seizure requires only probable cause, the trial court was correct to overrule the appellant's objection and the Fourteenth Court was correct to affirm that decision.

IV. The Elephant in the Room: The Traffic Stop

The traffic stop featured prominently in the trial court proceedings and in the Fourteenth Court's opinion. Though the appellant seems to ascribe no legal significance to the stop, the State believes it is worth a brief discussion.

Gemmill testified that the appellant was still in the car when she and her partner pulled up behind it to conduct a traffic stop. (RR 26). Defense counsel cross-examined Gemmill about this, but Gemmill maintained that the appellant was still in the car when officers initiated the traffic stop. (RR 37-39). Gemmill testified that it was "unusual" for someone to get out of a car during a traffic stop, and the appellant's behavior indicated to her that "he wanted to get away." (RR 47-48).

Gemmill testified that the appellant's role as a passenger in a stopped vehicle was the sole basis for detaining him. (RR 41). The trial court found that Gemmill was credible and her testimony truthful. (Supp. CR 5).

The law is clear that an officer conducting a traffic stop may detain not just the driver but also any passengers in the vehicle. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). The officer's authority to detain passengers normally lasts only as long as it takes to complete the ordinary investigation involved in a traffic stop. *Ibid.* In this case, though, as the Fourteenth Court noted, the appellant left the car and began walking away almost as soon as the stop occurred, thus there is no issue regarding the length or purpose of the detention. *See Thomas*, 2017 WL 2484366 at *6.

If Gemmill had the authority to detain the appellant as part of the stop, by definition she had the authority to stop him when he attempted to leave. The fact that the appellant left the stop and went immediately to his own property is an interesting twist on the typical fact pattern of a detention, but this does not convert Gemmill's lawful detention into a Fourth Amendment violation. Courts have long recognized that officers may chase fleeing suspects into areas that are

protected by the Fourth Amendment. *See United States v. Santana*, 427 U.S. 38, 43 (1976) ("a suspect may not defeat an arrest which has been set in motion in a public place … by the expedient of escaping to a private place."); *Davis v. State*, 905 S.W.2d 655, 661-62 (Tex. App.—Texarkana 1995, pet. ref'd) (officer seeking to detain suspect has right to follow suspect, at least, onto property and to front door of home). Allowing car passengers to avoid physical detention by simply walking away from traffic stops — whether to a home or elsewhere — would vitiate case law allowing officers to detain car passengers.

Moreover, while the appellant spends a considerable part of his brief discussing curtilage, notably absent is any case holding that officers may not walk up an unenclosed driveway. (*See* Appellant's Brief at 19-26). The appellant admitted pictures of his home, which show that his driveway is the only paved path from the street that leads to his door. (Def.'s Exs. 1, 2). The Supreme Court has been clear that the Fourth Amendment is not violated when a police officer enters that part of a person's property required to go up and knock on the door, so long as the officer does not then conduct a search. *See, e.g., Florida v. Jardines*, 569 U.S. 1, 8 (2013). Gemmill's entry onto the appellant's property fits into this category, as the plain-view seizure she

conducted once there is not a search. *See Walter v. State*, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000). Thus, even if a car passenger could gain some sort of home-base immunity by leaving a traffic stop and going into his home, that would not be implicated here because the appellant never made it past the publicly-accessible part of his driveway.

Conclusion

The State believes the Fourteenth Court's opinion correctly disposed of this case and is an accurate statement of the law.

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